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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-732

MAZIE LANCASTER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Facts

On February 2, 1968, at approximately 11:10 a.m., police officers from the White Plains Police Department and the Westchester County Sheriff's Office, armed with a search warrant, entered Texas Candy Store, 108 Brookfield Street, White Plains, New York. They observed the defendant, Mazie Lancaster, seated at a table talking on the phone with a pen in her hand and a pad of paper on the table (R407, 555, 564, 750). Upon observing the officers, the defendant

removed an item from the table and tucked it down the neck of her sweater (R408-09). She then asked, "Who are you? What's going on?" In response, Detective Baker answered, "Police. We have a search warrant" (R409-577). The defendant stating, "I'm in charge," asked to see the warrant and it was handed to her by Lieutenant Seit (R409-557). After having read the warrant, the defendant stated, "I'm not named in the search warrant" (R409-411, 557, 750). The officers then proceeded to search the premises.

Hidden in various portions of the premises, the officers found and seized various gambling records and paraphernalia. After having examined this evidence, Lieutenant Seit placed the defendant under arrest (R560-61). In response to his request (R563), Policewoman Littleberry made an incidental search of the defendant. She took off the defendant's sweater, removed her slip halfway, took down her bra and discovered the policy slips which formed the basis for the defendant's conviction (R835, 836).

There Was Probable Cause for the Issuance of the Search Warrant

The affidavit in support of the instant search warrant was in all respects sufficient to establish probable cause for its issuance. The premises in question was carried on the suspected gambling list by the White Plains Police Department which had made numerous arrests therein (R116a). This knowledge of the reputation of the premises contributed significantly to establishing probable cause for the warrant (*United States* v. *Harris*, 403 US 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 [1971]). In addition, the affiant, who was a police officer, experienced in the field of gambling, stated that not only had he observed a number of people enter and leave the premises without visible signs of purchase during his periods of observation, but also that a

good number of those were persons known to have been convicted of violations of the gambling laws (*People* v. *Smith*, 21 NY 2d 698, 287 NYS 2d 425, 234 NE 2d 460 [1967]; *People* v. *Valentine*, 17 NY 2d 128, 269 NYS 2d 111, 216 NE 2d 321 [1966]; *People* v. *Colon*, New York Law Journal, August 9, 1971, p. 12, col. 7).

> "As we have often observed probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers, but the 'laminated' total."
>
> *Smith* v. *United States*, 358 F. 2d 833 [1966], cert. den. 386 US 1008, 18 L.Ed. 2d 448, 87 S.Ct. 1350.

See also:

> *Bell* v. *United States*, 254 F. 2d 82 [1958] cert. den. 358 US 885, 3 L.Ed. 2d 113, 79 S.Ct. 126.

The affidavit in support of the search warrant having been in all respects sufficient to establish probable cause for the issuance of the warrant directing a search of the premises in question, the officers lawfully entered the premises and instituted a search.

The search warrant directed a search "of the premises located at 108 Brookfield Street, City of White Plains, New York, known as the Texas Candy Store, and apertures leading from said premises to other attachments, to wit, basement of house, to which entrance is accessable from store." The record clearly shows that there was no ready access to the basement area from any place other than Texas Candy Store (Compare: *Steele* v. *United States*, 267 US 498, 69 L.Ed. 757, 45 S.Ct. 414 [1925]).

There Was Probable Cause for the Arrest of the Defendant and the Incidental Search

The defendant was seated at a table in the Texas Candy Store with her coat off (R14) talking on the phone with a pen in her hand when the officers entered (R77, 199), and upon observing them, she placed a piece of paper down the neck of her sweater (R216). The defendant then said she was in charge and asked to see the search warrant (R13, 185, 201). Thus, when the officers discovered the policy slips, they had probable cause to arrest the defendant and to cause an incidental search to be made. It was as a result of that incidental search that the policy slips that formed the basis of the conviction were discovered.

The Statement by the Defendant Was Properly Obtained

Control of the premises was not a part of the charges upon which the defendant was convicted, therefore the statement, "I'm in charge," was important only as one element that gave rise to the initial arrest which gave the officers the right to conduct an incidental search.

While the testimony showed that the defendant said she was in charge, prior to having been asked, assume for the purpose of argument that when she asked to see the warrant, she was asked if she was in charge, or even if upon entering the store, the officers observed two persons in the store, one of whom had her coat off and was talking on the phone (not the public telephone booth) and asked who was in charge, the defendant's answer would still have been admissible (*Colocado* v. *State,* 251 So 2d 721 Fla. [1971]).

The officers had a search warrant for the premises (and two persons not present) and had a duty to inform the owner of the premises, or the person in charge thereof, of

their lawful authority to conduct a search. The officers thus had the duty to determine to whom the search warrant should be exhibited and the right to identify that person, without any warnings (*People* v. *Rodney P.*, 21 NY 2d 1, 286 NYS 2d 225, 233 NE 2d 255 [1967]).

> "The police are certainly entitled to make a reasonable inquiry as to the identity of the person they have taken into custody without the necessity of formal warnings."
>
> *People* v. *Rivera*, 26 NY 2d 304, 310 NYS 2d 287, 258 NE 2d 699 [1970].

Of course, as the defendant testified that she was not in charge, that statement could have been used on cross examination to impeach her even had it been improperly obtained (*Harris* v. *New York*, 401 US 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 [1971]).

The Defendant Was Given a Fair Trial

The missing minutes include an in-chambers conference prior to the jury selection, a preliminary charge to the jury and a portion of the voir dire. A motion to settle the record was made in the trial court. At that time defense counsel argued that he objected to certain matters directed at the preliminary trial conference and certain preliminary charges delivered by the Court. There was no objection to any part of the voir dire and therefore that matter was not considered by the trial court nor was it raised as an issue on appeal.

With the settlement of the record by the trial judge the record is substantially complete. In addition, the matters covered in the missing preliminary charge were all completely and accurately contained in the final charge which is a part of the record. Where there are not substantial

portions of the record missing, the appeal may be heard on the record as settled by the trial court (*People* v. *Lomeo*, 284 AD 670, 134 NYS 2d 129 [1954]).

The marshalling of the evidence and the charge was clear and more than fair to the defendant. In fact, when telling the jury that they could bring in a verdict of guilty or not guilty, the Court, apparently, because of a slip of the tongue, charged "on the first count you should bring in a verdict of not guilty" (R1156). While the defendant may allege that the jury would in fact realize that that statement was a slip of the tongue, it must be noted that the jury did in fact bring in a verdict of not guilty on the first count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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